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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARRELL WASHINGTON, Defendant and Appellant.	A123228 (Contra Costa County Super. Ct. No. 5070281-1)

Following the denial of his motions to suppress evidence and to set aside the information on the ground that he had been subjected to an illegal search and seizure, defendant Darrell Washington entered a plea of guilty to the single count of being a past-convicted felon in possession of a firearm, a violation of Penal Code section 12021. Defendant also admitted an allegation that he had a prior felony conviction that qualified as a strike in accordance with the Three Strikes Law. Pursuant to a negotiated disposition, additional charges and enhancement allegations were to be dismissed, with the understanding that defendant would be sentenced to a term of 44 months in state prison. After it denied his motion for leave to withdraw his guilty plea, the trial court sentenced defendant to the agreed-upon term of 44 months in state prison.

On this timely appeal, defendant contends that his motions were erroneously denied. We conclude that these contentions are without merit, and affirm.

The Trial Court Did Not Err In Denying Defendant's Motions To Set Aside the Information And Suppress Evidence

Defendant's possession of a firearm was discovered during the course of a vehicle stop. Pursuant to Penal Code section 1538.5, defendant moved to suppress all evidence generated by the stop on the ground that such evidence was the product of an unreasonable search and seizure, specifically, that he was detained without reasonable suspicion and that the detention was unduly prolonged. This was also the basis of defendant's motion to set aside the information pursuant to Penal Code section 995. Both motions were submitted on the basis of the transcript of the preliminary examination. That transcript may be summarized as follows:

The sole witness was San Pablo Police Officer Catherine Meyers, who testified that at approximately 2:30 a.m. on January 27, 2007, she was on duty, in her police vehicle, parked at the San Pablo Town Center. "I saw a vehicle turn around, do a U-turn and then park behind my vehicle. [¶] . . .[¶] I waived him to pass me because I was parked there." As the vehicle passed her, Office Meyers "noticed that the registration tags on the vehicle expired in 2005," so she "performed a traffic stop."

Officer Meyers "contacted" defendant, who was the driver and sole occupant of the vehicle, and "asked him if he had his license, registration, and insurance. And he produced all three of those for me." Defendant also produced "the current sticker that would have gone on his license plate." Officer Meyers then "asked him is he was on parole or probation. That's one of my standard questions that I ask on a traffic stop. And he informed me he was on parole." Officer Meyers went back to her car to inspect these documents. A radio call to "dispatch" showed that defendant was not the subject of any "wants or warrants," and that he was on parole.

Officer Meyers further testified that she "approached the vehicle and asked the suspect if he had anything illegal with him and he said he was clean. I then asked him to step out of the car so that I could perform the search." A pat search of defendant revealed "a loaded magazine clip." Approximately five minutes has elapsed since she initiated the traffic stop.

Officer Meyers continued: "I placed him in handcuffs and told . . . him that I would be searching his car as well." Defendant responded "that he would be straight forward with me and that he had, he ain't going to lie, that he had a gun under his front passenger seat." Under the front passenger seat Officer Meyers found a "nine millimeter Baretta" in working order.

The magistrate who conducted the preliminary examination denied defendant's oral motion to suppress on the same grounds subsequently reiterated as the basis for defendant's two written motions. The magistrate denied the motion, concluding—apparently as a matter of law—that the detention and search were valid under Penal Code section 3067 and the recent decision in *Samson v. California* (2006) 547 U.S. 843 (*Samson*):

"Section 3067 of the Penal Code subdivision (a) says quote: 'Any inmate who is eligible for release on parole . . . shall agree in writing to be subject to search or seizure by a parole officer or other peace office at any time of the day or night, with or without a search warrant and cause.' I don't think you can get a clearer explanation of what the conditions for search are . . . ."

As for *Samson*, the magistrate found it "controlling." The magistrate then quoted the following excerpt from *Samson*: "Nor is there merit to the argument that California's parole search law permits 'a blanket grant of discretion untethered by any procedural safeguards,' [citation]. The concern that California's suspicionless search system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society, is belied by California's prohibition on 'arbitrary, capricious or harassing' searches. [Citing, inter alia, Pen. Code, § 3067, subd (d).] The dissent's claim that parolees under California law are subject to capricious searches conducted at the unchecked 'whim' of law enforcement officers, [citation], ignores this prohibition. Likewise, petitioner's concern that California's suspicionless search law frustrates reintegration efforts by permitting intrusions into the privacy interest of third parties is also unavailing because that concern would arise under a suspicion-based regime as

well." (Quoting *Samson*, *supra*, 547 U.S. 843, 856-857, fn. omitted.) "And the court finds in this case under the facts here there is nothing capricious, arbitrary or harassing about this."

Before the trial court, defendant's counsel argued that the search would still be condemned even under the lenient *Samson* criteria: "[H]ere's why I'm saying it's arbitrary. There's no law enforcement purpose. You've got his license, registration, everything. He checks out. He should be let go, on his way. . . . [Officer Meyers] does make the inquiry, 'Do you have anything illegal?' He says, 'No.' And so then she says, 'Get out of the car.' How is that not arbitrary?" Counsel continued "there's got to be some cutoff. There's got to be . . . more than just, 'I'm on parole.' Otherwise, . . . the police could walk up to everyone on parole, 'Are you on parole?' [¶] 'Yes.' [¶] 'I'm going to search you'—[¶] . . . [¶] And I don't think the law allows for that. But that's what happened here."

The trial court interjected as this point to disagree: "No, that is not what happened here, and that's where I think your argument fails . . . that if the officer had simply done what you've just said, that would be arbitrary and capricious and harassment. [¶] But in this case, you've started out with a valid stop based on a good faith belief that there's something wrong with the tags, okay. And then . . . there's no way this officer was being arbitrary because the man was already stopped. [¶] And so I think it does serve legitimate law enforcement purposes to say . . . 'Before I go, are you on parole?' [¶] . . .[¶] That's what I'm trying to tell you. He wasn't picked out at random. You said earlier that any parolee walking down the street could just be stopped and searched. No, that's random. This isn't random. This isn't harassment."

Defense counsel protested that "I'm not saying the initial detention [was] random or arbitrary. I agree with you, it was legitimate," but it became arbitrary once Officer Meyers was satisfied that defendant's vehicle was properly licensed. The court responded: "I'm not persuaded. . . . I think you have to look at all the facts and not just say, okay, let's stop at this spot and now it becomes arbitrary." The court denied both motions.

Before tackling the merits, we note that precisely what is being challenged, and how it should be reviewed, are not at all clear from the briefs. As previously mentioned, defendant made two motions, one based on Penal Code section 995, and one based on Penal Code section 1538.5 The trial court apparently viewed the situation as being one motion. Defense counsel characterized it as "this is a 995 or a rehash of the 1538 below." So did the court. It conclude its ruling by stating "So the 995 is denied." The minutes for the hearing recite: "Def. Motion for 995 . . . Denied." However, both defendant and the Attorney General appear to accept that the sole matter for review is the trial court's denial of a motion seeking to suppress evidence pursuant to Penal Code section 1538.5.

It might have been significant had there been a serious clash of testimony or difficulty in discerning any salient factual findings made by either the magistrate or the trial court. (See *People v. Laiwa* (1983) 34 Cal.3d 711, 718 [differentiating appellate standards for reviewing § 995 and § 1538.5 rulings].) But here, the sole task before this court is issues of law involving the application of Fourth Amendment principles to what are in essence undisputed facts. (E.g., *People v. Carrington* (2009) 47 Cal.4th 145, 166; *People v. Memro* (1995) 11 Cal.4th 786, 846; *People v. Hunter* (2005) 133 Cal.App.4th 371, 377.)

Defendant reiterates the position he took in the trial court—Officer Meyers's decision to detain him was valid, but the detention became invalid when it was extended beyond the purpose for which the stop was initiated. In other words, once the officer learned that his vehicle was currently licensed, the fact that she knew defendant was subject to the search condition of his parole did not justify the officer's actions that led to the discovery of the weapon.

Although defendant's argument may be abstractly logical, the events of the detention are not, under the relevant legal principles, so easily segmented. As the trial court correctly insisted, a detention is to be judged in the light of the totality of the circumstances known to the detaining officer. (See *United States v. Arvizu* (2002) 534 U.S. 266, 273-278 and authorities cited.). "This process allows officers to draw on . . . cumulative information available to them . . . ." (*Id*. at p. 273; see *People v. Russell*

(2000) 81 Cal.App.4th 96, 102 ["Circumstances which develop during a detention may provide reasonable suspicion to prolong the detention."].) Courts are therefore wary of analyzing a detention that isolates the circumstances in an impermeable chronology.

Regardless of when the detention commenced, defendant could be required to submit to a pat search for weapons to protect Officer Meyers's safety. (E.g., *Illinois v. Wardlow* (2000) 528 U.S. 119, 121-122; *Terry v. Ohio* (1968) 392 U.S. 1, 27, 30; *People v. Huggins* (2006) 38 Cal.4th 175, 242; *People v. Thurman* (1989) 209 Cal.App.3d 817, 822-824.) This point is important because defendant revealed his status as a parolee *before* the officer satisfied herself that the vehicle was properly licensed. And Officer Meyers could hardly be expected to forget that information once she had verified defendant's documentation. In other words, defendant could have been pat searched earlier in the detention and the clips of bullets would have been discovered. The presence of the clips would naturally lead a prudent officer to wonder whether a weapon for them was also nearby.

In any event, the search condition was itself sufficient to authorize what Officer Meyers did. "When involuntary search conditions are properly imposed, reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious, or harassing." (*People v. Reyes* (1998) 19 Cal.4th 743, 752.) That the search might otherwise appear to be random, a point much emphasized by defense counsel in the trial court, is of no moment. "The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search condition is to deter the commission of crimes and to protect the public, and *the effectiveness of the deterrent is enhanced by the potential for random searches*." (*Id*., at p. 753, italics added.) The *Samson* court agreed. (See *Samson, supra,* 547 U.S. 843, 855 [quoting from *Hudson v. Palmer* (1984) 468 U.S. 517, 529 "observing that it would be 'naive' to institute a system of ' "planned random

searches" ' as that would allow prisoners to 'anticipate' searches, thus defeating the purpose of random searches."].)

Samson and *Reyes* leave no room for doubting the general validity of what the *Samson* court characterized as "suspicionless" parolee searches. The decisions cited in defendant's opening brief cannot be regarded as controlling because they are from intermediate state and federal courts, and thus do not trump those from the higher courts. The search to which defendant was subjected does not qualify as arbitrary, or capricious, or harassing.

Defendant correctly points out—and the Attorney General agrees—that section 3067 cannot, by itself, be controlling because it applies "only to an inmate who is eligible for release on parole for an offense committed on or after January 1, 1997" (§ 3067, subd. (c),) and all of defendant's priors occurred in 1988. But the validity of the parole search is not dependent upon section 3067. Long before that statute was enacted, a state regulation provided to the same effect, in language virtually identical to that used in section 3067. (Cal. Code Regs., tit. 15, § 2511, quoted in *People v. Lewis* (1999) 74 Cal.App.4th 662, 666, fn. 1 and *People v. Middleton* (2005) 131 Cal.App.4th 732, 740, fn. 8.) And in any event, *Reyes* stated a constitutional principle that is not dependent upon either statute or regulation. The details of defendant's priors, and the precise state of Officer Meyers's factual knowledge are immaterial; all that was needed was knowledge that defendant was a parolee. (See *People v. Middleton*, *supra*, at p. 740.) That much she knew prior to initiating the search.

The only additional argument we need to address is defendant's assertion that it was not established that it was a *California* parole search condition to which he was subject, thus making Penal Code section 3067 applicable. Apart from noting that this claim was not raised before either the magistrate or the trial court, the factual issue seems implicitly determined against defendant. When stopped in California, by a California officer, and defendant tells that officer he is on parole, it is implicit that his affirmative answer means a California parole. In addition, it is a reasonable inference from Officer Meyers's testimony that she confirmed defendant's parole status with her "dispatch" that

the confirmation showed a California parole. Put another way, it is highly unlikely that Officer Meyers would have actually proceeded with the search had she not known that she was authorized to do so by California law. In this connection, we note there is nothing in the record hinting at a felony committed in another state.

In light of the foregoing, we conclude that the trial court did not err in denying in denying defendant's motion(s).

The Trial Court Did Not Abuse Its Discretion In Denying Defendant's Motion For Leave To Withdraw His Guilty Plea

Defendant's suppression motions were denied on April 18, 2007. More than a year later, on June 5, 2008, defendant changed his plea to guilty. The court stated on the record the essentials of the negotiated disposition: "Mr. Washington, . . . it's my understanding, sir, that if you were to enter a plea to Count[] 1. . . that I would give you a sentence of 44 months, which would require that I strike one 'strike' and make certain findings, and give you that particular sentence." A second count—that of illegally possessing ammunition—would be dismissed. The court explained how the term was calculated: "So what I'm going to do is, I'm going to give you the low term on the 12021, double it with one 'strike' [i.e., another strike allegation in addition to the one the court would strike] and add the 667.5(b), which is one more year . . . . [¶] . . . [¶] 32 plus 12 is . . . 44. That's how I got there. So I am using that one-year prior."

The court asked whether defendant had had sufficient opportunity to "go over" the change of plea form and "enough time to talk with" his counsel "about . . . the offer, the 44 months." Defendant replied, "Yes." defendant acknowledged that counsel had explained to him how the sentenced was calculated. When the court queried defendant whether he understood all points on the change of plea form he had signed, defendant replied, "I was briefed on it pretty good." Nevertheless, the court gave defendant additional time to review the form. It then inquired, "So, Mr. Washington, did you get a chance to look at those areas that you did initial?" Defendant answered, "Yes, ma'am."

The court had additional inquiries:

"THE COURT: And you understand each of those areas?

"THE DEFENDANT: Yes.

"THE COURT: And on the back of the plea form, sir, is that your signature?

"THE DEFENDANT: Yes, ma'am."

"[¶] . . . [¶] THE COURT: Mr. Washington, other than what we've discussed today, has anybody promised you anything else to get you to plead?

"THE DEFENDANT: No.

"THE COURT: Has anybody threatened you or anybody close to you to get you to plead?

"THE DEFENDANT: No. Ma'am.

"THE COURT: Are you entering your plea today freely and voluntarily because this is the best way for you to handle this matter?

"THE DEFENDANT: Yes."

After counsel stipulated that there was factual basis for the plea, defendant entered a plea of guilty to the gun possession charge and admitted a "strike" allegation and the additional enhancement allegation that he had a prior felony conviction under Penal Code section 667.5, subdivision (b). The court then stated that it "accepts your plea and the admission of those enhancements" and "I find each to be made knowingly, intelligently, and freely."

On September 10, 2008, defendant filed a motion seeking leave to withdraw his plea on the ground that he "entered his plea to the charges due to improper pressure placed upon him and was not able to make a knowing, intelligent, voluntary waiver of his constitutional rights." The gist of his argument was that the court had initially offered a term of 32 months, that being "the mitigated term on count one doubled—imposing one of the alleged strike allegations." "At one point during the negotiations, the court, at the People's suggestion, and the defendant's counsel's concurrence, considered taking a lower sentence position than the 32 months if the defendant passed a polygraph test regarding how the defendant came into possession of the gun in this case. . . . The defendant then took the polygraph and 'failed.' " "Defendant now moves to withdraw his

plea of June 5, 2008 and requests that the court impose the previously negotiated sentence of 32 months . . . , which defendant had been promised before the polygraph, as defendant alleges that due to the 'pressure' surrounding that proposed disposition he had not 'freely and voluntarily' agreed to the disposition of 44 months." The motion was denied without argument immediately prior to defendant's sentencing.

Defendant contends that denial was error. He does not claim that he is entitled to specific enforcement of the indicated sentence of 32 months.

Penal Code section 1018 provides in pertinent part: "On application of the defendant at any time before judgment . . . , the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) A trial court's decision on a motion to withdraw a guilty plea will be reversed only if the reviewing court concludes that the decision is clearly shown to be an abuse of the trial court's discretion under the statute. (E.g., *People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 796; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.)

We see little point to extending this discussion. Defendant's arguments do not convince us that there was a concrete offer of 32 months that was not subject to the condition that defendant pass a polygraph test. He did not pass the test so the condition was not met. We quoted the transcript of defendant's change of plea at some length to demonstrate the absence of any indicia of coercion. Quite the contrary, the trial court acted with an almost over-scrupulous consideration for defendant to have sufficient time, with the assistance of counsel, to familiarize himself with the terms of the proposed plea agreement. Too, defendant's extensive experience with the criminal law—nine prior felonies are set out in enhancing allegations of the information—militates treating him as one who might be easily cowed by the novelty of a first prosecution. We are consequently unable to brand the denial of defendant's motion as an abuse of discretion.

DISPOSITION

The judgment of conviction is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.